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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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ROBERT B. RESSEGER and )  
CLAIRE M. RESSEGER, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CLACKAMAS COUNTY, )  
 )  
Respondent. )

LUBA No. 82-082  
FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Robert B. and Claire M. Resseger, Oregon City, filed the brief and argued the cause on their on behalf.

Cynthia L. Phillips, Oregon City, filed the brief and argued the cause on behalf of respondent.

BAGG, Board Member; COX, Board Member; participated in this decision.

REMANDED 2/02/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Law's 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal an order of the Clackamas County Board  
4 of Commissioners authorizing a non-forest use in a transitional  
5 timber, 20 acre zone (TT-20). The order allows a partitioning  
6 of an 8.6 acre tax lot into two parcels of 4.3 acres each and  
7 permits a single family residence on each lot. Petitioners ask  
8 that we overturn the order on the ground that it is in conflict  
9 with the county's comprehensive plan.<sup>1</sup>

10 FACTS

11 The subject property is part of a 13.95 acre parcel owned  
12 by E.S. Boynton, the applicant herein. The parcel was once  
13 part of a 140 acre tract owned by Mr. Boynton. The 8.6 acre  
14 portion subject to the county's order lies on the eastside of  
15 South Ridge Road, approximately one quarter mile south of its  
16 intersection with South Fishers Mill Road in the Fishers Mill  
17 area of Clackamas County. Petitioners own approximately 60  
18 acres of the original 140 acre parcel, and Mr. Boynton has  
19 divided the remaining 80 acres into various parcels ranging in  
20 size from 5 to 33 acres. Record 4.

21 A map in the record shows the subject property to be  
22 surrounded by tax lots of varying size. Map 93. To the north  
23 there is a 9 acre parcel and a 3.75 acre parcel, to the south  
24 there is a 5 acre parcel, across the road to the west there are  
25 several small parcels ranging in size from just under 5 acres  
26 to 5.3 acres. To the east is a parcel of 22.40 acres.

1 Farther to the south, ownerships increase in size. Also, there  
2 are larger lots (20 acres and larger) adjacent to lots  
3 bordering the subject property. It is not clear from the record  
4 whether the lines on the maps in the record show tax lots or  
5 lines of ownership.

6 The property includes SCS Class II agricultural soils and  
7 Douglas Fir Site Index II soils. Record 15, 70.

8 The applicant sought approval from the county planning  
9 department to create two 4.3 acre homesites.<sup>2</sup> The staff  
10 denied the application but did approve one non-farm residence  
11 on the 8.6 acre lot. Record 85, 86. The applicant appealed  
12 this decision to the county hearings officer, and the hearings  
13 officer denied any non-forest use on the subject property.  
14 Record 64-66. The applicant appealed this decision to the  
15 county board of commissioners, and the county board overturned  
16 the hearings officer. This appeal followed.

17 INTRODUCTION TO ASSIGNMENTS OF ERROR

18 The Clackamas County Comprehensive Plan defines forest  
19 lands as:

20 "Forest lands are composed of existing and potential  
21 commercial forest lands which are suitable for  
22 commercial forest uses and other forested lands needed  
23 for watershed protection, wildlife and fish habitat  
24 and recreation. Also included are lands where extreme  
25 conditions of climate, soil and topography require  
26 maintenance of vegetative cover, and forested lands in  
27 urban and agricultural areas which provide urban  
28 buffers, wind breaks, wildlife habitat, scenic  
29 corridors and recreational use."

30 The purpose of the transitional timber zone (TT-20) in

1 which this property lies is, in part, "to provide opportunities  
2 for rural living without significantly encroaching upon prime  
3 agricultural and timber lands." Clackamas County Zoning and  
4 Development Ordinance, Section 403.01(A). General criteria for  
5 applying the zone are:

- 6 "1. The ownerships in the area are generally twenty  
(20) acres.
- 7 "2. The area is generally in timber growing and  
8 related uses with some agricultural uses.
- 9 "3. The area provides a natural buffer or transition  
between land uses.
- 10 "4. The area is environmentally sensitive or  
11 otherwise requires protection, such as  
watersheds, wildlife habitats, scenic corridors.
- 12 "5. The area is subject to erosion, flooding,  
13 landslides or other natural hazards.
- 14 "6. The area is predominantly Douglas Fir Site Class  
15 I, II, III, IV, and V, as determined by the State  
and U.S. Forest Service."

16 We assume that one (or more) of these criteria was applied when  
17 the subject property was zoned TT-20.

18 The uses permitted in the TT-20 zone under Section 403.03  
19 of the county ordinance include both farm and forest uses.  
20 Single family dwellings are permitted in conjunction with a  
21 principle use. The forest uses are:

22 "Growing and harvesting of timber and other forest  
23 products including primary wood processing (which is  
24 defined as "that stage of manufacture next beyond the  
log stage of said timber such as (1) pole and piling  
25 preparation; (2) small portable sawmill, lumber  
cutting only; (3) wood chips; (4) fence posts; (5)  
26 firewood and related miscellaneous products.") [sic].  
Clackamas County Zoning and Development Ordinance,

1 Section 403.03(A).

2 Also, "general farm uses" are permitted in the zone under  
3 Section 403.03(B). These "general farm uses" include crop  
4 production sale and livestock enterprises.<sup>3</sup>

5 Section 403.05 of the ordinance permits single family  
6 dwellings not in conjunction with the principle use on  
7 undersized lots subject to the following criteria:

- 8 "1. Is compatible with forest uses described in  
9 subsection 403.03 of this Ordinance;
- 10 "2. Does not interfere seriously with accepted forest  
11 and farm practices, including chemical spraying  
or burning on adjacent lands devoted to farm or  
12 forest uses;
- 13 "3. Does not materially alter the stability of the  
overall land use pattern of the area;
- 14 "4. Is situated upon generally unsuitable land for  
15 the production of farm and forest products,  
16 considering the terrain, adverse soil or land  
conditions, drainage and flooding, vegetation,  
location and size of the tract;
- 17 "5. Will not be in conflict with the Comprehensive  
Plan or detrimental to surrounding property; and
- 18 "6. Complies with such other conditions as the  
19 Hearings Officer considers necessary."

20 All of petitioners' assignments of error attack the  
21 county's order for alleged non-compliance with the above  
22 criteria.

23 ASSIGNMENT OF ERROR NO. 1

24 Petitioners' first assignment of error alleges the county's  
25 findings "on compatibility are not supported by the evidence  
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1 and are improper." The county finding on the matter of  
2 compatibility, item 1 of Section 403.05, supra, states as  
3 follows:

4 "This proposal is compatible with forest uses and Goal  
5 4 of the Statewide Planning Goals and Guidelines.  
6 Properties to the northwest and south of the subject  
7 property are developed with single family residential  
8 uses. The area to the west of the subject property is  
9 substantially impacted by residential uses established  
10 on parcels of approximately five acres in size. The  
11 area to the east of the subject property slopes  
12 steeply downhill to the east. The residential  
13 development on adjacent parcels and the sloping nature  
14 of the area to the east tend to isolate the subject  
15 property and preclude the potential for merging this  
16 parcel with surrounding properties. Therefore, the  
17 request is generally consistent with the limited  
18 potential of the subject property for commercial farm  
19 and forest uses. The proposed use does not conflict  
20 with LCDC Goal 4, as the purpose of Goal 4 is to  
21 preserve forest lands for forest uses. This property  
22 has limited potential for commercial forest uses and  
23 therefore does not conflict with preservation of  
24 forest land." Order No. 82-1715, 2(a).

15 Petitioners claim the record shows the properties in the  
16 area are not "approximately 5 acres in size." Petitioners  
17 refer to a map in the record at page 93 to illustrate that the  
18 parcels are of varying sizes. Petitioners add there are trees  
19 on the property (Slide Exhibit No. 4 and Record 13), Douglas  
20 Fir seedlings (Record 33, 44, Aerial Photo, Exhibit No. 14).  
21 Petitioners view the property and the area as suitable for  
22 forest uses, therefore. Petitioners believe the county failed  
23 in its burden to show that small acreage homesites will be  
24 compatible with these forest uses.

25 Respondent argues that there is no evidence in the record  
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1 to show the property is suitable for the forest uses described  
2 in Section 403.03(A). Respondent cites testimony in the record  
3 (page 25 through 28) that two residences on the property would  
4 enhance the use of the property "as the residents would be able  
5 to handle weed problems, tansy spraying, cultivation of a  
6 garden and pasturing of a horse or cow." As we understand it,  
7 respondent's argument is that the property is not suitable for  
8 commercial timber operations but is suitable for small scale  
9 farm operations.

10 The above finding suggests the county views the issue to be  
11 one of whether the property will support commercial forest  
12 uses. The county finds the property has "limited potential"  
13 for commercial farm and forest use, and because of this limited  
14 potential, any requirement of compatibility with forest use is  
15 satisfied. We do not believe this approach to the criterion to  
16 be correct, and, therefore, we do not believe the finding  
17 adequately addresses the criterion in Section 403.05(1).

18 The county's finding does not address the requirement in  
19 sec 403.05(1) that the proposal be compatible with forest  
20 uses. "Forest uses" in Section 403.03 are not limited to just  
21 commercial forest uses. There is testimony in the record that  
22 there are forest and farm uses in the area. The county needs  
23 to explain how it is that this evidence is false or somehow not  
24 relevant. Further, the property is zoned for forest uses, and  
25 the county has a duty to explain in more detail what forest  
26 uses exist in the area and how precisely this division will be

1 compatible with those uses. That is, the county apparently  
2 took the property and its surroundings to be suitable for  
3 forest uses when it designated the property for such use in the  
4 zoning ordinance. If the county does not believe the zoning is  
5 correct, it should rezone the entire area, not partition and  
6 allow single family dwellings on it because the county now  
7 believes the area is in essence not suitable for forest use.

8 Assignment of error number 1 is sustained.

9 ASSIGNMENT OF ERROR NO. 2

10 Petitioners next complain that the county's "findings on  
11 interference with accepted Farm and Forest practices are not  
12 supported by fact and are improper." Petitioners are referring  
13 to Section 403.05(A)(2), supra. The county finding is as  
14 follows:

15 "The proposed use does not interfere seriously with  
16 accepted farm and forest practices on adjacent lands  
17 devoted to farm or forest uses. No parcels adjacent  
18 to the subject property are currently utilized for  
19 commercial farm or forest uses. The nearest  
20 commercial farm or forest uses are located to the  
southeast and northwest of the subject property.  
These areas are sufficiently separated from the  
subject property by distance and residential  
development to avoid any conflict from the non-forest  
use of the subject property."

21 Petitioners argue that their property is under the State  
22 Small Woodlands Program along with that of "the McCoy  
23 ownership, which adjoins the petitioners' on the east..."  
24 Petition for Review at 10, Record 33. Petitioners cite to  
25 evidence (petitioners' own testimony and a letter from the  
26



1 Oregon State Department of Forestry) that suggests that  
2 residential development interferes with accepted farm and  
3 forest practices. Record 35, 36, 100.

4 The respondent says the farming activity in the vicinity is  
5 limited and is "mainly" pasturing of livestock. Brief of  
6 Respondent at 5. As in assignment of error number 1,  
7 respondent says there is no "commercial" farm or forest  
8 activity on adjacent parcels. Respondent concludes that  
9 addition of two residences on 4.3 acre parcels will not  
10 interfere with other properties used for pasture.

11 While the county ordinance defines "forest land" as land  
12 devoted to commercial forest uses, we do not find the term  
13 "forest uses" similarly limited. The provision at 403.05(A)(2)  
14 is stated in absolute terms. In order to meet this criterion,  
15 the county is required to find that there will not be serious  
16 interference with accepted forest and farm practices including  
17 the use of chemical sprays or burning on adjacent lands that  
18 are devoted to farm and forest uses. While the county states  
19 that there are no parcels adjacent to the subject property  
20 "currently utilized for commercial farm or forest uses," there  
21 is evidence in the record to suggest that there are farm and  
22 forest uses occurring on adjacent land. The inquiry must be to  
23 present and potential farm and forest practices, commercial or  
24 otherwise. We are cited to nothing in the ordinance that  
25 limits the inquiry to whether there is interference with  
26 commercial forest and farm uses.<sup>4</sup> The county's finding fails

1 to address the criterion.

2 Assignment of error number 2 is sustained.

3 ASSIGNMENT OF ERROR NO. 3

4 Petitioners next argue that the county order is defective  
5 "because its finding that the proposed use does not materially  
6 alter the stability of the overall land use pattern of the area  
7 is not correct." The county finding is as follows:

8 "The proposed use does not materially alter the  
9 stability of the overall land use pattern of the  
10 area. The area on the west side of Southridge Road  
11 contains pre dominantly [sic] parcels consisting of  
12 approximately five acres. The area to the east side  
13 of the road, immediately adjacent to the road,  
14 contains a mixture of lot sizes ranging from  
15 approximately five acres to approximately nine acres.  
16 These lot sizes tend to increase as you move away from  
17 the property to the north and the south. Therefore,  
18 two 4.3 acre parcels would not be consistent with the  
19 development pattern of the area." Order No. 82-1715,  
20 2(c).<sup>5</sup> (Emphasis added).

21 Petitioners argue the county's finding is predicated on the  
22 size of tax lots. Petitioners claim the tax lot reference does  
23 not account for the fact that many ownerships include more than  
24 one tax lot, and a tax lot appearing on a map does not show the  
25 existence of a residence. Petitioners again point to the map  
26 on page 93 of the record and say that although the map shows  
two lots of 9 acres and 3.75 acres, the simple ownership is  
12.75 acres. Petitioners add that there is also one lot with  
one residence on 5 acres, and next to that parcel to the south  
is petitioners' property showing individual tax lots of 9.27,  
24.4 and 22.4 acres, all owned by petitioners. Petitioners

1 view ownership of the lots shown on the map to be significant,  
2 not the number and size of the tax lots. Petitioners conclude  
3 the proposal will not be consistent with development patterns  
4 in the area.

5 The standard is that the division should not materially  
6 alter the stability of the overall land use pattern of the  
7 "area." The county has limited its consideration of  
8 surrounding uses to the immediate neighboring parcels. The  
9 county ordinance does not define the "area," and we do not read  
10 the ordinance to limit the "area" of review to only the  
11 neighboring parcels. Had the county intended so circumscribed  
12 a definition of area, it would have used "immediate vicinity"  
13 or words to that effect. Limiting consideration to the  
14 immediate vicinity of a parcel does not provide analysis of the  
15 "overall land use pattern of the area." Also, it is not clear  
16 whether the county's review is of "ownerships" or tax lots.  
17 Tax lots mean nothing as far as land use planning is  
18 concerned. They are but lines of convenience for owners and  
19 assessor's office use. See Thede v Polk County, 3 Or LUBA 335,  
20 340 (1981).

21 The county needs to explain its area of study or explain  
22 how it arrives at an interpretation of the ordinance that would  
23 permit so limited a view of "area." The county then must  
24 study the ownership patterns and what uses exist. Convenience  
25 may suggest reference to tax lots where, for example, one tax  
26 lot contains one use and one another use, but the reference is

1 for convenience only, it does not form the standard to decide  
2 what lot sizes and development patterns exist in the area.  
3 Once this initial work is done, the county then is in a  
4 position to consider whether the proposed use is consistent  
5 with the development patterns in the area.

6 This assignment of error is sustained.

7 ASSIGNMENT OF ERROR NO. 4

8 Petitioners next state the county order is in error because  
9 "findings on suitability are not supported by the evidence and  
10 are improper." The county finding is as follows:

11 "The proposed use is situated upon generally  
12 unsuitable land for the production of farm and forest  
13 products. Although the soils type of the subject  
14 property is suitable for the production of farm and  
15 forest products, the subject property is heavily  
16 impacted by rural residential development to the  
north, west and south and further, by a steep sloping  
area to the east. The combination of residential  
development and topography isolate the subject  
property and limits its potential for commercial farm  
or forest uses." Order No. 82-1715, 2(d).

17 Petitioners argue the county's finding is without evidentiary  
18 support. Petitioners point to the soil suitability for farm  
19 and forest uses as evidence of the property's suitability for  
20 such uses.

21 The respondent says the property is not suitable for farm  
22 and forest use considering "location, terrain and size of the  
23 tract." Respondent argues, apparently from tax lot patterns  
24 and houses in the immediate vicinity, that the property is  
25 "heavily impacted by rural residential development to the  
26

1 north, west and south." Respondent also argues that because of  
2 a steep slope on one side, the property is not suitable for  
3 merger with other properties in the area so as to form a larger  
4 and perhaps a more economically viable forest or farm unit.

5 However, respondent refers to the property as being 8.6 acres  
6 in size and does not consider the entirety of the 13 plus acre  
7 parcel that forms the single ownership of the subject property.

8 Respondent also believes the forest site index and  
9 agricultural soils class to be of less importance than the size  
10 of the parcel. The respondent states that the "size of the  
11 parcel precludes its use for a commercial forest." Brief of  
12 Respondent at 8.

13 We do not believe the finding is sufficient to show that  
14 the land itself is "unsuitable" for the production of farm and  
15 forest products "considering the terrain, adverse soil or land  
16 conditions, drainage and flooding, vegetation, location and  
17 size of the tract." Section 403.05(4). The county's order  
18 does not explain the terrain, drainage, and vegetation on the  
19 property but relies instead on the impact of rural residential  
20 development nearby and on the sloping east side of the  
21 property. This reliance is incomplete. The county is required  
22 to explain in greater detail how it is that the parcel,  
23 considering all its qualities, is not suitable for farm and  
24 forest use. In considering suitability, the county must define  
25 the area of study, decide that farm and forest uses could exist  
26 in the area and determine whether this property is suitable for

1 these uses. The county's finding places too much emphasis on  
2 the immediate surroundings and not enough emphasis on farm and  
3 forest uses.<sup>6</sup> We note again that if this area and this  
4 property are not suitable for farm and forest uses, the county  
5 should consider rezoning the area.

6 This assignment of error is sustained.

7 ASSIGNMENT OF ERROR NO. 5

8 Petitioners' last assignment of error is that the order is  
9 "in conflict with the county's comprehensive plan and is  
10 detrimental to surrounding property." Petitioners are  
11 referring to item 5 of Section 403.05(A). In this assignment  
12 of error, the petitioners claim that the division will be  
13 detrimental to surrounding properties because increased density  
14 is a detriment to the preservation and protection of forest  
15 lands. Petitioners argue that fire damage is increased and  
16 fire control is made more difficult. Also, there are financial  
17 pressures to convert forest lands to residential uses, and  
18 petitioners further complain that there is an increase in theft  
19 and vandalism, erosion, and water quality and supply problems.

20 Respondent claims that the goal of the county's  
21 comprehensive plan is to preserve and protect forest lands for  
22 forest uses. The county's ordinance defines forest lands as  
23 "existing in potential commercial forest lands which are  
24 suitable for commercial forest uses...." The county claims  
25 that because of the small size of the parcel, it cannot be  
26 merged to make it a commercial property. The area is not

1 composed of forest lands that are to be protected under the  
2 plan. Respondent notes that there is fire protection nearby,  
3 and respondent generally questions the adverse environmental  
4 effects claims by petitioners.

5 We agree that the county's ordinance defines forest lands  
6 as lands that have potential for commercial forest uses.  
7 However, the standard that appears in Section 403.05 allowing  
8 non-forest uses on lands zoned for forest uses does not so  
9 limit the inquiry to "commercial" forest uses. We believe,  
10 therefore, that the county was obliged to consider the impact  
11 of the development on forest uses in general, not just forest  
12 uses that might be considered large enough to be  
13 "commercial."<sup>7</sup> Once again, should the county find that the  
14 area is composed of property not suitable for forest uses and  
15 is indeed not "forest land" as the term is defined in the  
16 county ordinance, we believe the county might consider rezoning  
17 the property.

18 To the extent the petitioners are arguing that the county  
19 has failed to show that the proposed uses will not be  
20 detrimental to farm and forest uses on surrounding properties,  
21 we sustain this assignment of error.

22 This matter is remanded to Clackamas County with  
23 instructions to proceed in a manner not inconsistent with this  
24 opinion.

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FOOTNOTES

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In the petition for review, petitioners make five assignments of error. The first four of these allege violation of LCDC Goal 4. However, though each assignment states a violation of LCDC Goal 4, the explanation of the alleged violation is tied to a subsection of Section 403.05 of the Zoning and Development Ordinance. We treat each of petitioners' assignments of error as an allegation of violation of a subsection of 403.05.

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2  
This case, then, involves a partition into three lots. The county's reference to the approval as a division of a "tax lot" into two parcels is, therefore, somewhat misleading. Three separate ownerships would be permitted by this approval.

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The general farm uses are:  
"1. Raising, harvesting and selling of crops;  
"2. Feeding, breeding, selling and management of livestock, poultry, fur-bearing animals or honeybees;  
"3. Selling of products of livestock, poultry, fur-bearing animals or honeybees;  
"4. Dairying and the selling of dairy products;  
"5. Preparation and storage of the products raised on such land for man's use and animal use;  
"6. Distribution by marketing or otherwise of products raised on such lands;  
"7. Any other agricultural use, horticultural use, animal husbandry or any combination thereof; and  
"8. Christmas tree farms." Section 403.03(B).

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4  
We do not know what the county means by "commercial." The



1 county has a duty, we believe, to explain this term if it  
2 intends to say that the ordinance is not designed to protect  
3 non-commercial uses. At one point, the county uses the fact  
4 that petitioner logs his 22.4 acre lot "only selectively" as  
evidence of "no commercial forest production." Brief of  
Respondent at 9. Clearly, logging is a forest use under the  
county's own definition at Section 403.03(A), supra.

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We assume the county simply misspoke itself here.

7 \_\_\_\_\_  
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See Meyer v Washington County, 3 Or LUBA 61 (1981); Thede  
9 v. Polk County, 3 Or LUBA 335 (1981); Kenagy v. Benton County,  
10 6 Or LUBA 93 (1982). This procedure is the same one to be used  
by counties with unacknowledged comprehensive plans. Clackamas  
County has received acknowledgment as to Goal 4, but the county  
11 must still comply with its ordinance. Where the ordinance  
demands an analysis of the area to determine compatibility,  
12 suitability, etc., the county must, in effect, take an area  
inventory (or refer to one) in order to meet the requirements  
of its own ordinance.

13 \_\_\_\_\_  
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We note again that we do not find a definition of  
15 "commercial" in the materials furnished by the county.